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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 J.SH SECURITY INDUSTRIES D.C.S.
11 LTD., *et al.*,

12 Plaintiffs,

13 v.

14 BARTECH SYSTEMS
15 INTERNATIONAL INC., *et al.*,

16 Defendants.

Case No. 2:07-cv-277-LDG (GWF)

Findings of Fact and
Conclusions of Law

17 The parties entered into an agreement awarding plaintiffs the exclusive right to
18 market defendant's hotel room refrigerators to the Sands. Despite this agreement, the
19 defendant directly marketed and sold its refrigerators to the Sands. The plaintiffs brought
20 this suit seeking to hold defendant liable for its conduct.

21 Having considered the pleadings, admissible evidence, and arguments of the
22 parties, the court concludes that the defendant breached the contract, breached the
23 implied covenant of good faith and fair dealing, and intentionally interfered with the
24 plaintiffs' prospective contractual relationship with the Sands. The following constitutes the
25 court's findings of fact and conclusions of law.
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1 The plaintiffs are J.SH Security Industries D.C.S. Ltd. and JSH International, Inc.
2 (“JSH”). JSH manufactures and sells hotel room safes. The defendant is Bartech Systems
3 International, Inc. (“Bartech”). Bartech manufactures and sells semi-automated and fully
4 automated hotel room refrigerators (“e-fridges”).

5 After building the Venetian Hotel in Las Vegas, the Sands began development of the
6 Palazzo tower as an additional phase of the Venetian Hotel. The Sands planned on
7 installing a safe and e-fridge in each of the approximately 3,000 rooms of the Palazzo.

8 Beginning in 2004 and continuing through early 2005, Bartech attempted to market
9 its e-fridges to the Sands for the Palazzo. Bartech recognized that its efforts were
10 hampered, in part, because the Sands had installed a competitor’s product in the first
11 4,000 rooms of the Venetian. Further, the competitor could offer the Sands a global
12 solution for the Palazzo; that is, the competitor could offer the Sands an e-fridge and a safe
13 that interfaced together. By April 2005, Bartech sent an e-mail to Pete Boyd of the Sands
14 in which Bartech acknowledged learning that the Sands had already decided upon the
15 product of Bartech’s competitor.

16 JSH began selling its products to the Sands prior to 2005.

17 In April 2005, JSH and Bartech first met regarding the possibility of working together
18 to market their products to the Sands for the Palazzo. On August 14, 2005, Bartech and
19 JSH entered into the “Americas Agreement.”¹ Pursuant to the Americas Agreement,
20 Bartech gave JSH “Exclusive Rights to market the Bartech product to the Venetian Hotel
21 chains in the Americas.” Stated in terms relevant to the present dispute, Bartech and JSH
22 entered into a valid and binding contract pursuant to which Bartech agreed that JSH had
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24 ¹ The parties dispute whether JSH first approached Bartech or whether Bartech
25 first approached JSH. They also dispute whether the other party was the primary drafter of
26 the Americas Agreement, thus requiring any ambiguities to be interpreted against the other
side. The court finds that neither JSH nor Bartech was the primary drafter, but that both
are equally responsible for the ambiguities in the Americas Agreement.

1 the exclusive right to market Bartech's e-fridges to the Sands for its Palazzo tower project.
2 This exclusive right was effective to December 31, 2006, but would be automatically
3 extended to December 31, 2007, if "JSH will obtain orders of about 3000 various [e-
4 fridges]." After signing the Americas Agreement, JSH timely commenced the performance
5 of its obligations under that agreement.

6 During this same time period, the Sands was developing a project in Macau and
7 Bartech was also attempting to market its e-fridges to the Sands for Macau.

8 On September 1, 2005, Bartech sent a Letter of Intent to JSH. Pursuant to the
9 letter, Bartech would consider appointing JSH as an exclusive dealer for Macau. Bartech
10 further stated "[t]his agreement shall not be effective unless it has been signed 3000
11 efridges for the Venetian Hotel in Las Vegas, NV (USA) before May 1st, 2006."²

12 On March 18, 2006, Bartech sent an e-mail to JSH. The e-mail references a
13 meeting between the two entities that occurred the prior week. The e-mail then recites "the
14 conditions for the Macau deal." Pursuant to the stated conditions, JSH could not take the
15 purchase order for Macau and JSH would receive a 5% commission based on the
16 purchase order, but such commission was only due if the Sands ordered an automatic e-
17 fridge for Macau.

18 JSH's efforts to market Bartech e-fridges to the Sands for the Palazzo culminated in
19 an April 16, 2006, meeting. At that meeting, which Bartech attended, JSH presented a
20 written proposal directly to the Sands for Bartech e-fridges and JSH safes. The written
21 proposal set forth the following as "hotel responsibilities": "25% down payment," "25% upon
22 shipping date," and "Balance net 30." Following the meeting, JSH received a verbal

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24 ² None of the principal officers of JSH and Bartech involved in this dispute
25 speak English as a first language. Nevertheless, English was the common language of the
26 two companies, and the Americas Agreement, the Letter of Intent, and other written
communications between the two entities were written in English. Throughout these
Findings and Conclusions, the court has quoted the writings of JSH and Bartech exactly as
written.

1 communication from the Sands that the Sands had decided to purchase Bartech's e-
2 fridges from JSH. The Sands also notified JSH that subsequent changes might be made,
3 such as the exact number of units and the final design and color.³ Consistent with its prior
4 dealings with the Sands, JSH considered this verbal communication to be a verbal order for
5 e-fridges that would subsequently be followed with a written purchase order and a deposit
6 or full payment.

7 By letter dated April 27, 2006, JSH represented to Bartech that the Sands formally
8 notified JSH that it had been selected as the supplier of e-fridges. Attached to the letter
9 was JSH's written order to Bartech for 3,036 e-fridges. JSH further represented to Bartech
10 that the Sands had advised JSH that changes in the order might occur, and that the Sands
11 requested 60 to 90 days to give details.

12 On May 17, 2006, JSH sent Bartech an e-mail stating "[o]n April 29, 2006 we placed
13 with Bartech Las-Vegas office an order of 3000 Bartech Units. According to the agreement
14 between us that 'if we shall place an order with Bartech for at least 3000 units for the
15 Venetian, we shall become the exclusive distributors of Bartech in the Macau area.'" On
16 May 23, 2006, Bartech sent an e-mail to JSH. The e-mail begins by asserting that "[i]t
17 looks like you have forgotten what was agreed when we have meet in Las Vegas on March
18 7th." The e-mail continues by stating that "[t]he Letter of intent was denounced 2 months
19 before we have received the Purchase Order for Las Vegas. . . ."

20 Bartech also generated, on May 23, 2006, an invoice to JSH for \$425,040.00 for the
21 25% deposit for the Palazzo hotel. The invoice recites 3,036 Bartech e-fridges at \$560.00
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24 ³ JSH offered testimony that it received this communication through Pete Boyd.
25 Though Bartech failed to timely identify Boyd as a trial witness, Bartech sought leave
26 during the trial to call Boyd regarding this verbal communication. The court granted
Bartech's request and permitted Boyd to testify. Boyd's testimony did not rebut or call into
question JSH's evidence regarding the communication.

1 each, for a total estimated order of \$1,700,160.00. The invoice recites a due date of May
2 28, 2006.

3 During this time, the Sands was using a procurement company, World Sourcing
4 Services Limited, for the procurement of vendors' products for the Sands' Palazzo project
5 as well as projects in Macau. On June 8, 2006, Bartech sent a letter to World Sourcing
6 reciting the relationship between Bartech and JSH.

7 As to the Palazzo, Bartech acknowledged that it had entered into an agreement with
8 JSH, and that "JSH who knew the relevant persons in Las Vegas have been handling the
9 global⁴ negotiations with Venetian Las Vegas since the beginning." Bartech concluded that
10 "[t]his situation is still accurate."

11 As to Macau, Bartech recited that Bartech and JSH had signed a Letter of Intent,⁵
12 that the Letter of Intent was not an agreement, and that the subject of the Letter of Intent
13 was the possibility that JSH would become an exclusive Bartech distributor for Macau.
14 Bartech further stated that the "Validity Terms" included "To sign a contract for the sale of
15 3000 e-fridges to the Venetian in Las Vegas before May 1st, 2006. As you informed me
16 yesterday, no order was signed between Venetian Vegas and JSH to date. Therefore, the
17 condition stated in the letter of intent was not fulfilled, the letter is invalidated."

18 On June 13, 2006, Bartech sent JSH a letter, which begins: "We were just made
19 aware by the Sands Group that they did not place any order for the Palazzo in Las Vegas
20 though on April 27th, 2006, you placed an order from us for 3,036 Bartech efridges for a
21 total amount of \$1,700,160.00 for the same hotel and stated that you had received an
22 order from the customer. It is an outstanding issue." The letter subsequently states: "If it
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24 ⁴ The context of the Bartech letter indicates that the term "global" refers to
25 negotiating the sale of both e-fridges and safes to the Palazzo, rather than a reference to
the geographic extent of the negotiations.

26 ⁵ Bartech did not offer any evidence at trial that JSH signed the Letter of Intent.

1 happens to be true, this obvious breach of trust will de facto result in the unilateral
2 termination of our agreement without notice”

3 Bartech concedes that, beginning in June 2006, it began negotiating with World
4 Sourcing to have the Sands purchase e-fridges directly from Bartech rather than through
5 JSH. Bartech further notified World Sourcing that the Sands could not purchase Bartech e-
6 fridges through JSH, but could only purchase Bartech e-fridges directly from Bartech.
7 Unless otherwise excused, this conduct by Bartech was in breach of the Americas
8 Agreement.

9 On or about August 3, 2006, the Sands issued a purchase order to JSH for 3,000
10 safes. The purchase order specified a “BARTECH INTERFACE FOR ON-LINE
11 COMMUNICATION.”

12 On November 15, 2006, the Sands issued a purchase order to JSH for 3,000
13 Bartech e-fridges. After the Sands issued the purchase order to JSH, World Sourcing
14 informed the Sands that the Sands could only purchase the Bartech e-fridge directly from
15 Bartech. On November 17, the Sands cancelled its purchase order to JSH. On November
16 21, the Sands issued a purchase order to Bartech for 3,000 Bartech e-fridges.

17 Breach of Contract

18 Bartech argues that its conduct, which resulted in the Sands purchasing e-fridges
19 directly from Bartech rather than through JSH, was justified and did not breach the
20 Americas Agreement because JSH had, prior to Bartech’s conduct, twice breached the
21 Americas Agreement. On the basis of its assertion that JSH was the first to breach the
22 Americas Agreement, Bartech argues that it was discharged from its contractual obligations
23 under that agreement. See, *Bradley v. Nevada-California-Oregon Ry.*, 42 Nev. 411, 412
24 (1919) (“If there is anything well settled it is that the party who commits the first breach of
25 the contract cannot maintain an action against the other for a subsequent failure to
26 perform.”)

1 Bartech presents somewhat of a moving target as to JSH's first alleged breach.
2 That is, although Bartech summarily asserts that JSH breached the Americas Agreement
3 by its "misrepresentation . . . that it had received a purchase order" (Bartech Post-Trial
4 Brief, p. 2, l. 21, and p.18, l. 16), it nevertheless argues that JSH breached an *implied* term
5 of the Americas Agreement that either (a) "require[d] JSH to have a legally enforceable
6 contract with [Sands] (i.e. a purchase order) before it obtain[ed] e-fridges from Bartech"
7 (Bartech Post-Trial Brief, p.19, ll.10-12), or (b) that required JSH to "hav[e] a contract with
8 [Sands] prior to purchase. . . ." (Bartech Post-Trial Brief, p. 21, ll. 23-25). Thus, Bartech
9 sets forth assertions or arguments based upon *three* distinct actions by JSH: (a) JSH's
10 misrepresentations that it had received an order from the Sands, (b) JSH's obtaining of e-
11 fridges from Bartech before getting a purchase order from the Sands, or (c) JSH's
12 purchasing or ordering e-fridges from Bartech before getting a purchase order from the
13 Sands. Bartech contends that JSH also breached the Americas Agreement by failing to
14 timely make a down payment on its order. None of these alleged actions constitutes a
15 breach of the Americas Agreement by JSH.

16 Bartech's argument that the Americas Agreement included an implied term that JSH
17 was required to have a legally enforceable contract with the Sands before JSH obtained e-
18 fridges is irrelevant because JSH did not obtain 3,000 Bartech e-fridges intended for the
19 Sands prior to Bartech's breach.

20 Bartech's argument that the Americas Agreement included an implied term requiring
21 JSH to have a written purchase order from the Sands before JSH could submit its
22 purchase order to Bartech is without merit. In support of its assertion that such an implied
23 term exists, Bartech initially argues that the "only reasonable interpretation" of the Americas
24 Agreement is that it controls "the manner in which JSH is to exclusively market the Bartech
25 products to the Venetian Hotel chain in the Americas." That is, Bartech argues that both its
26 and JSH's duties under the agreement "are centered on sales to the Venetian hotel chain

1 in the Americas.” The argument is irrelevant because JSH’s order to Bartech expressly
2 indicated that the e-fridges were for the Sands. Bartech has not offered any evidence that
3 JSH submitted the purchase order to facilitate a sale of e-fridges to any entity other than
4 the Sands. Further, the requirement that JSH could only sell Bartech’s e-fridges to the
5 Sands does not implicitly require that JSH *first* obtain a purchase order from the Sands
6 before ordering e-fridges. Rather, such a requirement merely limited JSH to re-selling the
7 e-fridges it purchased to the Sands.

8 Bartech’s second argument—that the Americas Agreement had an implied term
9 requiring JSH to *first* obtain a written purchase order from the Sands—arises from
10 Paragraph 5 of the Americas Agreement. That paragraph states, in full:

11 The terms of payment of JSH to Bartech will be linked to the terms of
12 payment from the Venetian Hotel chains to JSH. It was agreed that these
13 payment terms will include a down payment to Bartech and a full payment at
completion of the installation.

14 Bartech asserts that the “only way to reconcile these sentences is by interpreting [them] as
15 meaning that JSH must negotiate for and receive both a down payment and a final
16 payment at completion, but the size of the down payment and the size and timing of any
17 additional payments is ‘linked’ to how JSH is paid by [the Sands].” Bartech Post-Trial Brief,
18 p.20, ll.23-27.

19 The court finds that the first sentence linked the terms of payment from JSH to
20 Bartech to the terms of payment from the Sands to JSH. A down payment is a term of
21 payment. Although generally paid at the time of sale, the parties could alter the timing of
22 the down payment. While the second sentence of Paragraph 5 requires that the terms of
23 payment between JSH and Bartech include a down payment to Bartech, the first sentence
24 establishes the timing of that down payment. Paragraph 5 altered the timing of JSH’s
25 down payment obligation by linking it to the Sands’ obligation to make a down payment to
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1 JSH.⁶ Neither the first nor second sentence of Paragraph 5, however, requires that the
2 timing of the Sands' down payment obligation precede the timing of JSH's order to
3 Bartech.⁷

4 Bartech's argument that JSH breached the Americas Agreement by misrepresenting
5 that they had obtained a purchase order fails for several reasons. The Court finds that JSH
6 did not represent to Bartech that JSH had received a written purchase order from the
7 Sands. Rather, after the April 16, 2006, meeting between JSH and Sands (which Bartech
8 attended), JSH received a verbal communication from the Sands. JSH considered the
9 verbal communication to be a verbal order for the e-fridges to be installed in the Palazzo.
10 JSH expected that, consistent with prior dealings, the Sands would subsequently issue a
11 written purchase order. On April 27, 2006, JSH represented to Bartech that the Sands
12 formally notified JSH that it had been selected as the supplier of e-fridges.

13 Further, Bartech has not directed the court's attention to any express term of the
14 Americas Agreement breached by JSH's conduct in representing that the verbal
15 communication it received from the Sands was a verbal order. Likewise, Bartech has not
16 offered any argument that the Americas Agreement includes an implied term breached by
17 JSH's representation regarding the verbal communication it received from the Sands.

18 The court disagrees with Bartech's argument that the Letter of Intent, and its May
19 1st, 2006, deadline, gave JSH a "substantial motive" to misrepresent to Bartech that it had
20 received an order from the Sands. Rather, the Letter of Intent gave JSH a substantial

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22 ⁶ The Court disagrees with JSH's assertion, stated at page 14, lines 18-19 of
23 its post-trial brief, that Bartech got paid when JSH got paid. The first sentence of
24 Paragraph 5 does not "link" payments, but links the "terms of payment." At a minimum,
Paragraph 5 required that, in the circumstance of JSH placing an order with Bartech and
the Sands placing an order with JSH, JSH became obligated to pay Bartech when the
Sands became obligated to pay JSH, regardless of whether the Sands actually paid JSH.

25 ⁷ While Paragraph 5 linked the timing and amount of payments if the Sands
26 issued a purchase order, it did not excuse JSH's obligations to Bartech if JSH submitted an
order but then failed to obtain a purchase order from the Sands.

1 motive to sign an order for 3,000 e-fridges. The Letter of Intent, which was written by
2 Bartech, is at best ambiguous. The letter states that “[t]his agreement shall not be effective
3 unless it has been signed 3000 efridges for the Venetian Hotel in Las Vegas, NV (USA)
4 before May 1st, 2006.” As shown by its May 17th e-mail to Bartech, and as shown by its
5 placement of an order with Bartech for 3,000 e-fridges for the Venetian, JSH construed the
6 Letter of Intent as requiring that JSH sign an order with Bartech for 3,000 e-fridges for the
7 Venetian before May 1st, 2006. Thus, Bartech’s asserted promise—to consider JSH as an
8 exclusive dealer for Macau—motivated JSH to sign an order for 3,000 e-fridges before May
9 1, 2006.

10 Finally, the court finds that JSH’s obligation to pay a down payment to Bartech was
11 not due prior to Bartech’s breach of the Americas Agreement. As discussed above, and as
12 this court ruled in denying Bartech’s motion for summary judgment on this issue, pursuant
13 to Paragraph 5 of the Americas Agreement, the timing (or due date) of JSH’s down
14 payment to Bartech was linked to the Sands’ obligation to make a down payment to JSH.
15 JSH’s down payment to Bartech was not yet due at the time of Bartech’s breach because
16 the Sands was not yet obligated to make a down payment to JSH. While Bartech issued
17 an invoice to JSH asserting that the due date for the down payment was May 28, 2006,
18 such due date was inconsistent with the Americas Agreement. As the Americas
19 Agreement required any change to be signed by both parties, and as JSH did not sign the
20 invoice, the due date on the invoice did not alter the terms of the Americas Agreement.
21 Accordingly, as this court previously ruled, JSH’s down payment to Bartech was not due
22 prior to Bartech’s breach.

23 As Bartech breached the Americas Agreement, and as JSH did not breach the
24 Americas Agreement, JSH is entitled to damages arising from Bartech’s breach.

1 Breach of the Implied Covenant of Good Faith and Fair Dealing

2 Bartech's conduct was also in breach of the covenant of good faith and fair dealing
3 that, under Nevada law, is implied in every contract. See *A.C. Shaw Const. v. Washoe*
4 *County*, 105 Nev. 913, 914 (1989). For the same reasons that Bartech is liable on JSH's
5 claim for breach of contract, Bartech is liable on JSH's claim for breach of the implied
6 covenant of good faith and fair dealing.

7 Intentional Interference with Contractual Relations and with Prospective Business
8 Advantage

9 To establish an intentional interference with prospective business advantage, JSH
10 was required to show (a) a prospective contractual relationship between JSH and the
11 Sands, (b) Bartech's knowledge of the prospective relationship, (c) Bartech's intent to harm
12 JSH by preventing the relationship, (d) the absence of privilege or justification by Bartech,
13 and (e) actual harm to JSH as a result of Bartech's conduct. See, *Leavitt v. Leisure Sports,*
14 *Inc.*, 103 Nev. 81, 88 (1987). The elements of the tort of intentional interference with a
15 contract are similar but concern a valid and existing contract rather than a prospective
16 contract. See, *Sutherland v. Gross*, 105 Nev. 192, 196 (1989).

17 Prior to November 15, 2006, Bartech engaged in conduct intended to disrupt a
18 prospective contract between JSH and the Sands. That conduct included an instruction to
19 World Sourcing that the Sands could not purchase e-fridges from JSH. On November 15,
20 2006, the Sands issued its purchase order to JSH. The purchase order was a valid and
21 existing contract. On November 17, 2006, the Sands cancelled the order. The Sands
22 acted upon information received from World Sourcing that World Sourcing had received
23 from Bartech before the Sands issued the purchase order. In short, the evidence
24 established that Bartech interfered with JSH's prospective contract with the Sands but not
25 with JSH's contract during the time that contract existed. Bartech was not justified or
26 privileged to engage in its intentionally disruptive conduct. JSH's placement of an order for

1 3,000 e-fridges for the Sands comported with the terms of the Americas Agreement.
2 Accordingly, JSH is entitled to damages on its claim for intentional interference with a
3 prospective contractual relationship but not on its claim for interference with a contractual
4 relationship.

5 Damages

6 On November 21, 2006, the Sands issued a purchase order to Bartech for 3,000
7 fully automated e-fridges with an internal capacity of 55 liters and with 41 sensors. On April
8 30, 2007, the Sands revised its November 21, 2006, purchase to reflect that it was
9 purchasing 3,000 fully automated e-fridges with an internal capacity of 65 liters and with 41
10 sensors. The cost per unit was \$811.00 Bartech argues that JSH's damages should be
11 measured by the price JSH was willing to accept for the 55 liter e-fridge, as evidenced by
12 the Sands' November 15, 2006, purchase order to JSH. The revised purchase order to
13 Bartech, however, establishes the model that the Sands would have ordered from JSH and
14 the amount that the Sands would have paid to JSH in the absence of Bartech's conduct.

15 Pursuant to the Americas Agreement, the cost to JSH for a fully automated Bartech
16 e-fridge with an internal capacity of 65 liters and with 41 sensors was \$570.00. Bartech
17 argues that this price was only guaranteed for six months, and that the price was "linked to
18 Bartech general price list" after the six-month price guarantee expired. Bartech contends
19 that, pursuant to this language, JSH's cost for the e-fridges increased to the price quoted
20 on Bartech's general price list when the six-month price guarantee expired.

21 The argument is inconsistent with and contradicted by Bartech's own conduct.
22 Pursuant to the Americas Agreement, JSH could purchase the 55 liter e-fridge for \$560.
23 On May 23, 2006, three months after the price-guarantee expired, Bartech issued an
24 invoice to JSH quoting a price of \$560.00 for the 55 liter e-fridges. Bartech's invoice
25 establishes that the language linking the price to JSH to Bartech general price list did not
26 cause the price to JSH to become the general price when the six-month price guarantee

1 expired. Rather, the language linking the price to JSH to Bartech general price list did not
2 cause the price to JSH to be increased or otherwise adjusted when the six-month price
3 guarantee expired. Accordingly, JSH's cost for the 65 liter Bartech e-fridge was \$570.00.

4 The difference between the \$811 price that Sands' paid for the e-fridges and the
5 \$570 price at which JSH represents a profit of \$241 per unit that JSH lost because of
6 Bartech's breach. As the Sands purchased 3,000 e-fridges, JSH's damages resulting from
7 lost profits on all units purchased by the Sands is \$723,000.00.

8 Bartech also obtained a licensing and maintenance fee of \$.07 per day per room
9 from the Sands. As the Sands purchased 3,000 e-fridges, the total fee for one year was
10 \$76,650. Pursuant to the Americas Agreement, Bartech agreed to guarantee its e-fridges
11 for a period of one year, subsequent to which Bartech would make a separate service
12 agreement directly with the Sands. Absent Bartech's breach, JSH would have received
13 this licensing and maintenance fee for one year while Bartech would have provided the
14 servicing pursuant to the Americas Agreement. Accordingly, JSH was further damaged in
15 the amount of \$76,650.00.

16 JSH argues that its damages include the shipping and installation costs for each e-
17 fridge. In support of the argument, JSH asserts that the cost to JSH under the Americas
18 Agreement was a "turnkey" price, and that "turnkey" meant that the price to JSH *included*
19 Bartech's shipping and installation of the e-fridges. JSH further asserts that the Sands paid
20 these shipping and installation charges to Bartech. As such, but for Bartech's breach, the
21 Sands would have paid JSH for the shipping and installation but Bartech would have been
22 obligated to pay the shipper and installer. JSH is not entitled to damages arising from
23 shipping and installation because it did not meet its burden of showing that the "turnkey"
24 price quoted in the Americas Agreement included shipping and installation by Bartech.

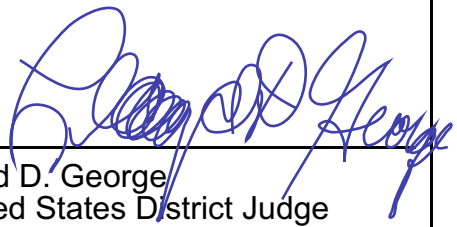
25 The total damages to which JSH is entitled is \$799,650.00.
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Punitive Damages.

An award of punitive damages is not appropriate.

DATED this 2 day of August, 2010.



Lloyd D. George
United States District Judge